

A **Kuala Lumpur Landmark Sdn Bhd v Standard
Chartered Bank**

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1-22-525-93

B ANUAR J

21 FEBRUARY 1994

Civil Procedure — *Res judicata* — *Application for orders for sale in foreclosure proceedings* — *Subsequent application by chargor for specific relief* — *Whether action barred by res judicata*

C *Banking* — *Securities for advances* — *Loan secured by charge* — *Foreclosure proceedings commenced by bank* — *Redemption agreement entered into* — *Whether redemption agreement replaced charges*

D *Contract* — *Agreement* — *Whether time of the essence* — *Whether payment of interest for delay indicative that time was not of the essence*

Contract — *Frustration* — *Delay in performance of the agreement* — *Whether agreement frustrated*

E *Contract* — *Repudiation* — *Whether there was repudiation which was accepted by other party*

The defendant bank granted a loan of RM20m to various borrowers on the strength of charges created over the plaintiff's land. In 1988, the defendant commenced proceedings to have the plaintiff's land sold. On 6 July 1989, settlement agreements were entered into between the defendant and each of the borrowers and each settlement agreement referred to a redemption agreement ('the agreement'), which was entered into between the plaintiff and the defendant. The agreement provided that the plaintiff was to pay RM2m to the defendant on the execution of the agreement and was to deliver to the defendant, a bank guarantee which guaranteed the payment of the RM18m on demand. Although the sum of RM2m had been paid, the bank guarantee had yet to be provided. By a letter dated 27 November 1989, the plaintiff requested for an extension of time to deliver the bank guarantee, but the defendant refused to allow them the extension.

On 30 November 1989, Monsia Investments Pte Ltd ('Monsia'), one of the borrowers, took out a writ ('the Monsia suit') and obtained an ex parte injunction restraining the defendant and the plaintiff from proceeding with or completing the agreement. That injunction was subsequently extended. The defendant applied for a stay of the proceedings in the Monsia suit but the application was dismissed by the High Court. On 30 July 1991, the Supreme Court allowed an appeal against the dismissal of the defendant's application and stayed the proceedings in the Monsia suit. Neither the plaintiff nor the defendant, both of whom were defendants in the Monsia suit and

against both of whom the injunction operated, took any steps to have that injunction dissolved.

In this case, the defendant argued that the agreement had been frustrated by the grant of the injunction in the Monsia suit and that accordingly, it was at liberty to proceed and obtain an order for sale. On 5 December 1990, the High Court ruled that the defendant could proceed with the originating summons of 1988 notwithstanding the orders obtained by Monsia. The plaintiff claimed for a declaration, specific performance of the agreement and other relief. The defendant applied to strike out the plaintiff's statement of claim and for the plaintiff's action to be stayed or dismissed or for other consequential relief.

Held, allowing the plaintiff's application and dismissing the defendant's application:

- (1) The plaintiff was not precluded by the decision in the foreclosure proceedings from filing and proceeding with the present action.
- (2) The agreement replaced the charges on the plaintiff's land and once it was entered into, the effect was to denude those charges of any legal effect. Therefore, the defendant could not claim for the full amount due under the charge, but at most was only entitled to recover the RM18m provided for under the agreement.
- (3) The agreement did not expressly provide that time was of the essence; no notice had been given by either party to make time of the essence; and the nature of the contract or its subject matter, in this case the redemption of lands that were subject to charges, do not make time of the essence. Moreover, the parties did not intend for time to be of the essence and the requirement to pay interest for any delay also indicated that time was not of the essence.
- (4) The defendant would suffer no detriment or loss of benefit or any prejudice by the delay in the performance of the agreement. The interest on the sum of RM18m was the benefit it would receive if there was delay. Moreover, the defendant was only obliged to discharge the charges after they have received the RM18m and any interest due. Therefore, the injunction on the Monsia suit did not frustrate the agreement.
- (5) Taking into account all the circumstances of the case, there was no true repudiation in this case by the defendant which acted on the assumption that the agreement had been frustrated and was therefore entitled to prosecute the foreclosure proceedings and there was therefore no true acceptance of a repudiation as the law understands it by the plaintiff whose intention was to redeem the lands. In any event, the defendant had taken the position that it has never repudiated the agreement and should not now be heard to say that the plaintiff accepted a repudiation that never was.
- (6) Looking at all the circumstances of the case and taking into account that no prejudice whatsoever would result to the defendant,

A justice would not be served by penalizing the plaintiff for its delay in approaching the court. Moreover, the defendant had not raised any triable issue in the present case. The court therefore granted specific relief to the plaintiff.

B **[Bahasa Malaysia summary]**

C Defendant bank telah memberi suatu pinjaman sebanyak RM20 juta kepada beberapa peminjam yang tertentu berdasarkan beberapa gadaian atas tanah plaintiff. Dalam tahun 1988, defendan telah memulakan prosiding untuk menjual tanah plaintiff. Pada 6 Julai 1989, suatu perjanjian penyelesaian telah diikat di antara defendan dan setiap peminjam dan setiap perjanjian penyelesaian itu telah merujuk kepada suatu perjanjian penebusan ('perjanjian itu'), yang telah diikat antara plaintiff dan defendan. Perjanjian itu telah memperuntukkan supaya plaintiff membayar RM2 juta kepada defendan apabila perjanjian itu disempurnakan dan menyerahkan kepada defendan suatu gerenti bank yang menggerenti pembayaran balik sebanyak RM18 juta atas tuntutan. Walaupun jumlah sebanyak RM2 juta itu telah dibayar, gerenti bank itu masih belum diberikan. Melalui sepucuk surat yang bertarikh 27 November 1989, plaintiff telah meminta supaya suatu lanjutan masa diberi untuk penyerahan gerenti bank itu tetapi defendan tidak membenarkan lanjutan itu.

E Pada 30 November 1989, Monsia Investments Pte Ltd ('Monsia'), seorang daripada peminjam, telah mengeluarkan suatu writ ('guaman Monsia itu') dan telah mendapat suatu injuksi ex parte untuk menghalang defendan dan plaintiff daripada meneruskan atau menyempurnakan perjanjian itu. Injuksi itu kemudiannya telah dilanjutkan. Defendan telah memohon supaya guaman Monsia itu digantung tetapi permohonan itu telah ditolak oleh Mahkamah Tinggi. Pada 30 Julai 1991, Mahkamah Agung telah membenarkan suatu rayuan terhadap penolakan permohonan defendan itu dan telah menggantung prosiding di dalam guaman Monsia itu. Plaintiff mahupun defendan, yang kedua-duanya menjadi defendan di dalam guaman Monsia itu dan terhadap mana injuksi itu beroperasi, tidak mengambil langkah untuk mengetepikan injuksi itu.

G Di dalam kes ini, defendan telah berhujah bahawa perjanjian itu telah dikecewakan oleh pemberian injuksi itu di dalam guaman Monsia itu dan oleh yang demikian, mereka bebas untuk meneruskan dan untuk mendapat suatu perintah jualan. Pada 5 Disember 1990, Mahkamah Tinggi telah membuat keputusan bahawa defendan boleh meneruskan dengan saman pemula tahun 1988 itu walaupun terdapat perintah yang diperolehi oleh Monsia itu. Plaintiff telah memohon untuk suatu deklarasi, pelaksanaan spesifik perjanjian itu dan relief lain. Defendan telah memohon untuk membatalkan pernyataan tuntutan plaintiff dan supaya tindakan plaintiff digantung atau diketepikan atau untuk relief berbangkit yang lain.

Diputuskan, membenarkan permohonan plaintif dan menolak permohonan defendan: A

- (1) Plaintif tidak dihalang oleh keputusan di dalam prosiding perampasan daripada memfailkan dan meneruskan dengan tindakan masakini.
- (2) Perjanjian itu telah mengambil tempat gadaian atas tanah plaintif itu sebaik sahaja ia diikat, dan akibat itu, ia telah memusnahkan sebarang kesan undang-undang gadaian itu. Oleh itu, defendan tidak boleh menuntut jumlah penuh yang terhutang di bawah gadaian itu, tetapi ia hanya boleh mendapat balik paling banyak RM18 juta yang telah diperuntukkan di dalam perjanjian itu. B
- (3) Perjanjian itu tidak memperuntukkan secara nyata bahawa masa menjadi asas; notis tidak diberikan kepada kedua-dua pihak untuk membuat masa menjadi asas; dan sifat atau isi kontrak, di dalam kes ini penebusan tanah yang telah digadai itu, tidak membuat masa menjadi asas. Lebih-lebih lagi, kedua-dua pihak tidak bermaksud supaya masa menjadi asas dan peruntukan untuk membayar faedah untuk sebarang kelewatan juga menunjukkan bahawa masa tidak menjadi asas. C D
- (4) Defendan tidak dijejaskan atau mengalami sebarang kerugian manfaat atau sebarang kemudaratannya disebabkan kelewatan dalam pelaksanaan perjanjian itu. Faedah atas jumlah RM18 juta itu merupakan manfaat yang akan diperolehi jika terdapat kelewatan. Lebih-lebih lagi, defendan hanya perlu melepaskan gadaian itu selepas mereka menerima RM18 juta dan sebarang faedah yang perlu dibayar. Oleh itu, injuksi atas guaman Monsia itu tidak mengecewakan kontrak itu. E
- (5) Memandangkan kesemua keadaan di dalam kes ini, tidak terdapat penolakan perjanjian itu yang sebenar oleh defendan di dalam kes ini yang telah bertindak atas andaian bahawa perjanjian itu telah dikecewakan dan oleh itu berhak membawa tindakan di dalam prosiding perampasan itu dan oleh itu, tidak terdapat penerimaan penolakan itu yang sebenarnya seperti yang dimaksudkan oleh undang-undang oleh plaintif yang bertujuan untuk menebus tanah itu. Walau bagaimanapun, defendan telah mengambil pendirian bahawa mereka tidak pernah menolak perjanjian itu dan sekarang tidak boleh mengatakan bahawa plaintif telah menerima penolakan itu yang tidak pernah terjadi. F G
- (6) Memandangkan kesemua keadaan kes ini dan dengan mempertimbangkan bahawa tidak terdapat sebarang kemudaratannya kepada defendan, adalah tidak adil jika plaintif dihukum kerana lewat datang ke mahkamah. Lebih-lebih lagi, defendan tidak membangkitkan sebarang isu yang perlu dibicarakan di dalam kes ini. Oleh itu, mahkamah telah memberi relief spesifik kepada plaintif. H I

A Notes

For cases on loans secured by a charge, see 1 *Mallal's Digest* (4th Ed) paras 862–863, 884–891, 933–936.

For cases on the frustration of a contract, see 3 *Mallal's Digest* (4th Ed, 1994 reissue) paras 1604–1620; [1990] *Mallal's Digest* 169; and [1991] *Mallal's Digest* 721–722.

B

For cases the repudiation of a contract, see 3 *Mallal's Digest* (4th Ed, 1994 reissue) paras 2012–2016.

Cases referred to

- 1 *Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd* [1991] 2 MLJ 251 (refd)
- C 2 *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 (folld)
- 3 *Oversea-Chinese Banking Corp Ltd v Sindoma Realty Sdn Bhd and other applications* [1989] 1 MLJ 377 (refd)
- 4 *Ram Kirpal v Rup Kuari* LR 11 IA 37 (refd)
- 5 *Sithambaram Chettyar v Chong Fatt* [1939] MLJ 298 (refd)
- D 6 *Supermarl Ltd v Federated Homes Ltd* 9 Const LR 25 (refd)
- 7 *Sharikat Eastern Plastics Industry v Sharikat Lam Seng Trading* [1972] 1 MLJ 21 (refd)
- 8 *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 (refd)
- E 9 *Parkin v Thorold* (1852) 51 ER 698; 22 LJ Ch 170 (refd)
- 10 *Patrick v Milner* (1877) 2 CPD 342; 46 LJQB 537 (refd)
- 11 *Ramli bin Zakaria v Government of Malaysia* [1982] 2 MLJ 257 (refd)
- 12 *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904; [1977] 2 WLR 806 (refd)
- F 13 *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (folld)
- 14 *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 (folld)
- 15 *Johnson v Agnew* [1980] AC 367; [1979] 1 All ER 883; [1979] 2 WLR 487 (refd)
- G 16 *Fercometal SARL v MSC Mediterranean Shipping Co* [1989] AC 788; [1988] 2 All ER 742; [1988] 3 WLR 200 (refd)

Sri Ram (GK Ganeson with him) (Sri Ram & Co) for the plaintiff.

Cecil Abraham (RS Nathan with him) (Shearn Delamore & Co) for the

H defendant.

Anuar J: There are two applications before me. The first is a summons (encl (4)) dated 8 July 1993 taken out by the defendant to strike out the plaintiff's statement of claim under O 18 r 19(1) of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the court. This application also asks for an order that the plaintiff's action be stayed or dismissed and for other consequential relief. The second application is a summons (encl (10)) dated 1 November 1993 taken out by the plaintiff for judgment under O 14 for declaratory relief and under O 81 for specific

I

performance. By agreement of counsel who appeared before me, I heard both applications together. A

The facts of the case before me are quite straightforward and indeed, all material facts and evidence are not in dispute and are contained in the documentary exhibits produced under the several affidavits filed by the parties.

The subject matter of the action is a redemption agreement dated 3 June 1989. Since this agreement recites, to some extent, the history of the relationship between the parties and since its terms are of critical importance, I reproduce the whole of that document here below. B

Redemption agreement C

This agreement is made this 3 June 1989 between Standard Chartered Bank a bank incorporated by Royal Charter in the United Kingdom with a place of business in Malaysia at No 2 Jalan Ampang Kuala Lumpur (hereinafter called 'the Bank') of the one part and Kuala Lumpur Landmark Sdn Bhd a company incorporated in Malaysia with its registered office at 15th Floor Bena Tower, 160 Jalan Ampang, 50450 Kuala Lumpur (hereinafter called 'the Chargor') of the other part. D

Whereas

- (1) By a charge dated 25 January 1986 and registered on 17 February 1986 in the register of Charge Presentation No 1694/86 Vol 412 Folio 86 (hereinafter called 'the first charge') the lands held under Grant for Land 12374 Lot No 30 Sec 45, CT 3730 Lot No 10 Sec 45, CT 16778 Lot No 33 Sec 45, CT 16779 Lot No 34 Sec 45, CT 16780 Lot No 35 Sec 45 and CT 16781 Lot No 36 Sec 45 all in Bandar Kuala Lumpur (hereinafter called 'the said lands') were charged by the Chargor to the Bank to secure the repayment of a loan of RM20m (Ringgit twenty million) (hereinafter called 'the said loan') granted by the Bank to one Dato' Yap Yong Seong (hereinafter called 'YYS') together with interest. E
- (2) By another charge dated 25 January 1986 and registered on 17 February 1986 in the register of Charge Presentation No 1695/86 Vol 412 Folio 87 (hereinafter called 'the second charge') the said lands were charged a second time by the Chargor to the Bank to secure the repayment of banking facilities to the limit of RM4m (Ringgit four million) (hereinafter called 'the banking facilities') granted by the Bank to one Saya Holdings Sdn Bhd (hereinafter called 'SHSB'). F
- (3) By another charge dated 25 January 1986 and registered on 17 February 1986 in the register of Charge Presentation No 1696/86 Vol 412 Folio 88 (hereinafter called 'the third charge') the said lands were charged a third time by the Chargor to the Bank to secure the repayment of banking facilities to the limit of RM50m (Ringgit fifty million) (hereinafter called 'the Monsia facilities') granted by the Bank to one Monsia Investments Pte Ltd (hereinafter called 'Monsia'). G
- (4) By a general memorandum of deposit of stocks shares bonds and documents dated 4 February 1986 the share certificates in respect of a total of 15m (fifteen million) shares in Cindee Developments Sdn Bhd (hereinafter called 'the Cindee shares') were deposited by the registered owners thereof with the Bank purportedly as part of the security for the repayment of the Monsia facilities. H I

- A** (5) By an agreement dated 27 September 1985 the Bank granted to one Duta Credit Sdn Bhd (hereinafter called 'DCSB') a loan of RM300,000 (Ringgit three hundred thousand) (hereinafter called 'the Duta loan') to be repaid with interest thereon to finance the purchase by DCSB of two lots to be subdivided from the lands held under Beaufort Lease No 175310595, Nos 302 and 288 together with two units of double storey shophouses to be built thereon designated as Lot No 75 and 76C in Beaufort Jaya, district of Beaufort, Sabah (hereinafter called 'the two lots').
- B**
- C** (6) By a deed of assignment dated 27 September 1985 DCSB assigned to the Bank all its rights title and interest in and to the two lots and under the sale and purchase agreement pertaining to the two lots and the full benefits granted thereby and all stipulations therein contained and all remedies for enforcing the same and to hold the same unto the Bank absolutely as security for the repayment of the Duta loan.
- (7) YYS, SHSB, Monsia and DCSB have each defaulted in their obligations to the Bank under the said loan, the banking facilities, the Monsia facilities and the Duta loan respectively.
- (8) The Chargor is desirous of redeeming the said lands from the Bank upon the terms herein set forth.
- D**

Now this Agreement witnesseth as follows:

- (1) In consideration of the premises and the covenants herein contained the Chargor hereby agrees that it shall make payment of a total sum of RM20m (Ringgit twenty million) to the Bank in the following manner:
- E**
- 1.1 on the execution of this agreement the Chargor shall pay to the Bank the sum of RM2m (Ringgit two million);
- 1.2 on the expiration of (15) fifteen months from the date of this agreement the Chargor shall pay to the Bank the sum of RM18m (Ringgit eighteen million).
- F** (2) On or before the expiration of 6 (six) months from the date of this agreement the Chargor shall deliver to the bank a bank guarantee issued by a bank acceptable to the Bank (hereinafter called 'the guarantor bank') in such form as shall be acceptable to the Bank which shall, inter alia, guarantee on demand the payment of a sum of RM18m (Ringgit eighteen million) to the Bank on the expiry of the said bank guarantee which shall be valid for a period of 9 (nine) months from the date of its issuance.
- G** (3) Upon the receipt of the said sum of RM2m (Ringgit two million) on the execution of this agreement:
- 3.1 the Bank shall deliver the share certificates in respect of the Cindee shares to the registered owners thereof;
- 3.2 the Bank shall deliver to DCSB a duly executed reassignment of all its rights title and interest in and to the two lots and under the sale and purchase agreement pertaining to the two lots in favour of DCSB.
- H**
- YYS has given to the Bank his written consent to cll 3.1 and 3.2 above.
- (4) The Bank hereby agrees that the Bank shall discharge the first charge, the second charge and the third charge upon the Bank's receipt and acceptance of the bank guarantee referred to in cl 2 above by delivering to the Chargor a signed discharge of charge in respect of the said lands and the issue documents of title in respect of the said lands as well as the relevant forms to be filed in the Registry of Companies.
- I**

(5) For the avoidance of ambiguity, it is hereby agreed that:

- 5.1 the failure by the Bank to obtain the prior written consents of YYS as referred to in cl 3 above for any reason whatsoever shall not release the Chargor from its obligation to pay the total sum of RM20m (Ringgit twenty million) or any part thereof to the Bank in accordance with this agreement;
- 5.2 the failure by the Chargor to pay the balance sum of RM18m (Ringgit eighteen million) or to deliver to the Bank the said bank guarantee acceptable to the Bank in accordance with cl 2 above or the failure of the guarantor bank to pay the said sum of RM18m (Ringgit eighteen million) pursuant to the said bank guarantee upon demand by the Bank or any other matter shall not render the sum of RM2m (Ringgit two million) paid on the execution hereof or any part thereof refundable to the Chargor. The said sum of RM2m (Ringgit two million) may be appropriated at any time by the Bank if it so decides in its sole and absolute discretion towards partial or total satisfaction of any one of the debts owed by YYS or SHSB or Monsia or DCSB to the Bank;
- 5.3 in the event that the Bank does not receive a bank guarantee acceptable to the Bank within 6 (six) months from the date of this agreement, the Bank shall be entitled to take such proceedings as it shall deem fit for the recovery of all sums due to the Bank from YYS and/or SHSB and/or Monsia and/or DCSB under the said loan and/or the banking facilities and/or the Monsia facilities and/or the Duta loan as if this agreement had not been entered into *provided that* the sum recoverable by the Bank hereunder shall be limited to a principal sum of RM18m (Ringgit eighteen million) together with interest thereon at the Bank's prevailing base lending rate from the date that is six months from the date of this agreement until the date of full realization.

In witness whereof the parties hereto have set their hands or seal this 3 June 1989.

Signed by)
KS Wesson)
for and on behalf of)
Standard Chartered Bank)
in the presence of:)

—Sgd—
(KS Wesson)

Jennifer NF Cheong
Advocate & Solicitor

The common seal of)
Kuala Lumpur Landmark)
Sdn Bhd was hereunto)
affixed in the)
presence of:)

.....
Director

.....
Director/Secretary

As can be seen from the recitals of the redemption agreement, several facilities have been granted to various borrowers on the strength of charges created over the plaintiff's lands. The plaintiff itself however does not

A appear to be a borrower or customer of the defendant bank. In fact, Mr Cecil Abraham for the defendant did not argue that this was the case.

On 6 July 1989, settlement agreements were entered into between the defendant and each of the borrowers for those loans the plaintiff's lands had been charged. Each settlement agreement refers to the redemption agreement.

B It is admitted by both sides that the RM2m referred to in cl 1 of the redemption agreement was paid. What remained was the plaintiff's obligation under cl 2 to provide a bank guarantee for the balance of RM18m.

C At the time the redemption agreement was entered into, the defendant had already commenced proceedings to have the plaintiff's lands sold by way of Kuala Lumpur High Court Originating Summons No S7-31-3903-88 ('the foreclosure proceedings').

D By a letter dated 27 November 1989, the plaintiff requested the defendant for an extension of time to deliver the bank guarantee. By a letter dated 30 November 1989, the defendant, by its solicitors, replied refusing any extension of time. On the same day, ie 30 November 1989, Monsia Investments Pte Ltd ('Monsia') which was one of the borrowers, took out a writ in Kuala Lumpur High Court Civil Suit No D1-22-2521-89 ('the Monsia suit') supported by a statement of claim and obtained an injunction ex parte restraining the defendant and the plaintiff herein from proceeding with or completing the redemption agreement. That injunction was subsequently extended. The defendant in the present action (which was the first defendant in the Monsia suit) took out an application to stay proceedings in the Monsia suit on the ground of forum non conveniens. On 5 April 1990, that application was dismissed by the High Court. On 30 July 1991, the Supreme Court allowed an appeal against the dismissal of the defendant's application and stayed proceedings in the Monsia suit. It is common ground that neither the plaintiff nor the defendant, both of whom were defendants in the Monsia suit and against both of whom the injunction operated, took any steps to have that injunction dissolved.

G In the meantime, hearing of the foreclosure proceedings was fixed on 2 April 1990 and subsequently, to 16 July 1990. At the hearing of the foreclosure proceedings, a preliminary point of law was argued. The defendant in the present action argued that the redemption agreement had been frustrated by the grant of the injunction in the Monsia suit and that accordingly, it was at liberty to proceed and obtain an order for sale. I pause to note that the foreclosure proceedings were in respect of two charges only, namely, Charge Registration No 1694/86 Vol 412 Folio 86 and Charge Registration No 1695/86 Vol 412 Folio 87. On 5 December 1990, the High Court ruled, and I quote from the order of the court 'that the plaintiff (meaning the Bank) may proceed with the originating summons dated 16 December 1988 notwithstanding that the orders obtained by Monsia Investment Pte Ltd in Kuala Lumpur High Court Civil Suit No D1-22-2521-89 on 30 November 1989, 5 December 1989 and 22 January 1990'.

I In a written judgment, Lim Beng Choon J, who heard the matter, held that the injunction in the Monsia suit had frustrated the redemption agreement and that consequently the Bank was entitled to enforce its rights

in the foreclosure proceedings. [See *Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd.*¹] There is an appeal pending against that judgment and pending the disposal of that appeal, there has been a stay granted of the order for sale that had been subsequently made by Lim Beng Choon J on 11 December 1990.

Mr Abraham has also drawn to my attention the fact that in June 1991, a director of the plaintiff, one Lim Fap Khoon, had commenced proceedings in his personal capacity to restrain the defendant from executing the order for sale obtained by it on 11 December 1990. I have examined this aspect of the case most carefully but I find that that case was based on a personal contract between Lim Fap Khoon and the defendant bank. In any event, the injunction obtained by Lim ex parte was dissolved on 25 June 1993 and he has lodged an appeal against that decision. In the meantime, on 11 June 1993, the present suit was taken out by the plaintiff claiming a declaration, specific performance of the redemption agreement and other relief.

RES JUDICATA

In the forefront of Mr Abraham's argument is the proposition that the decision of Lim Beng Choon J in the foreclosure proceedings holding that the redemption agreement had been frustrated is res judicata. It is on that ground that he moves to strike out the plaintiff's action. Mr Abraham's submissions on this point are sufficiently answered by the decision of the Supreme Court in *Kandiah Peter v Public Bank*.² However, he has sought to argue that that decision is wrong and that I should not follow it. He has also attempted to argue that the decision in *Peter Kandiah*² is not consistent with an earlier decision of the Supreme Court in *Oversea-Chinese Banking Corp Ltd v Sindoma Realty Sdn Bhd.*³

The report of *Sindoma*³ is the judgment of the High Court. There, the learned judge had refused an injunction for several reasons, including the fact that there had been foreclosure proceedings which had dealt with the same issue. The Supreme Court dismissed an appeal against that decision but gave no reasons for doing so. I am therefore unable to say with any certainty as to why the Supreme Court upheld the decision of Abu Mansor J in *Sindoma*.³ It may well have been for reasons based on the exercise of discretion by a judge refusing an injunction without having gone into the res judicata point at all.

Moreover, I have given this matter my most anxious consideration and I am entirely satisfied that not only is the decision in *Kandiah Peter*² plainly binding on me but that also that it is correct. Mr Abraham's argument that the decisions relied upon by the Supreme Court in *Kandiah Peter*² were made while the old Civil Procedure Code was in force is met by the following passage in the judgment of the Privy Council in *Ram Kirpal v Rup Kuari*:⁴

The matter decided by Mr Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and these claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment

- A in a suit is binding upon them in carrying the judgment into execution. *The binding force of such a judgment depends not upon s 13, Act X of 1877 (s 6 of our former Civil Procedure Code) but upon general principles of law.*

See also *Sithambaram Chettyar v Chong Fatt*.⁵

- B For the reasons I have given, I hold that the decision of Lim Beng Choon J in the foreclosure proceedings do not preclude the plaintiff from filing and proceeding with the present action.

THE EFFECT OF THE REDEMPTION AGREEMENT ON THE CHARGES

- C From a reading of the redemption agreement, it is clear that the parties thereto, namely, the plaintiff and defendant, intended that the charges were to be replaced by the redemption agreement. This is made clear by the proviso to cl 5.3 of the redemption agreement under which the maximum sum recoverable by the defendant is only RM18m. At this stage, it is important to note that according to the order for sale made on 11 December 1990, the sum due was RM32,514,773.37 and interest thereon at the rate of 10%pa on monthly rests from 12 December 1990 until settlement.

- D As I understand Mr Abraham's contention put forward in oral argument, it is that the redemption agreement does not preclude the defendant from claiming more than RM18m, ie the full amount due under the charges if there should be default by the plaintiff of its obligations under the redemption agreement. Reading the agreement as a whole, I cannot accept Mr Abraham's argument. I ask myself the question as to what would have happened (the injunction apart) if the bank guarantee had not been provided by the plaintiff as required by the redemption agreement. The answer to that question must be that the maximum sum recoverable in any recovery proceedings by the defendant bank cannot be greater than RM18m. I am also impressed by the fact that cl 5.3 of the redemption agreement does not refer to the foreclosure proceedings which were already pending at the time when the redemption agreement was entered into and which would therefore have been foremost on the minds of the contracting parties.

- F In the *Law and Practice of Compromise* by David Foskett (3rd Ed) the learned author states [at p 107]:

- H Generally speaking, therefore, an agreement of compromise will discharge all original claims and counterclaims *unless* it expressly provides for their revival in the event of breach. Reference had been made previously to a compromise defeasible upon condition subsequent. Where a party is anxious to be able to revive his original claim in the event of the other party's failure to comply with his obligations under the compromise, a term to that effect (which will, in effect, be one defeating the compromise upon the failure of the subsequent condition) should be incorporated. This applies to mere agreements and those effectuated by a judgment or order reflecting finality. (Emphasis added.)

- I In *Supermarl Ltd v Federated Homes Ltd*,⁶ it was held that where there is a valid compromise agreement about claims, breach of its terms does not revive the original claims.

Having very carefully read and re-read the redemption agreement, I can find nothing that has reserved unto the defendant bank the right to pursue

the foreclosure proceedings to the hilt in the event of the plaintiff failing, for any reason, to fulfil its obligation. Indeed, the opening words of cl 5 are 'For the avoidance of ambiguity', which go to show that the parties were intent on making it absolutely clear what they meant to have between them under the agreement.

In the circumstances, it is my judgment that the redemption agreement replaced the charges recited in it and once it was entered into, the effect was to denude those charges of any legal effect.

TIME OF THE ESSENCE

It is part of Mr Abraham's argument that time is of the essence of the redemption agreement. The general principles as to time being of the essence of a contract have been summarized in the judgment of Mohamed Azmi J (as he then was) in *Sharikat Eastern Plastics Industry v Sharikat Lam Seng Trading* [at p 21]:⁷

On the first issue, the general principles as to time being [of] the essence of the contract have been dealt with by Gill J (as he then was) in the case of *Tan Ah Kian v Haji Hassan* [1962] MLJ 400, a decision approved and affirmed by the Federal Court ([1963] MLJ 175). The three situations in which his Lordship had considered time to be [of] the essence of the contract are:

- (i) where the parties have expressly stipulated in the contract that it shall be so;
- (ii) where it was not originally stated to be but has been made so by one party by giving reasonable notice to the other, who has failed to perform the contract with sufficient promptitude, and
- (iii) where from the nature of the contract or of its subject matter time must be taken to be of the essence of the agreement.

Applying these principles, I have the following observations to make:

- (1) the redemption agreement does not expressly provide that time is of the essence;
- (2) no notice has been given by either party to make time of the essence; and
- (3) the nature of the contract or its subject matter, in this case the redemption of lands that are subject to charges, do not, in my view, make time of the essence.

On the other hand, reading the agreement as a whole and taking into account the surrounding circumstances and the factual background including the genesis and the objective aim of the transaction (which I am entitled to do in accordance with the decision of the Federal Court in *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd*⁸ at p 247), I am satisfied that the parties did not intend time to be of the essence. The requirement to pay interest, which is to be found in the proviso to cl 5.3 of the redemption agreement, in the event of default is an indicia that time is not of the essence.

Thus, in *Parkin v Thorold*,⁹ cl 7 of a sale and purchase agreement provided that in the event of default of completion of the purchase of the land by the purchaser, he shall pay interest at the rate of 5% up to the time

- A of actual completion. Clause 15 of that agreement also provided that in the event of the purchaser's neglect or failure to complete the purchase by the time stipulated in that agreement, the vendor was entitled to forfeit the deposit and to re-sell the land. In that case, the purchaser was obliged to complete the purchase of the land on or before 25 October 1850. It was held in that case that time was not of the essence. Lord Romilly MR also observed that because the subject matter of the contract was land and was therefore not of a perishable nature, time was not of the essence.
- B

- Again, in *Patrick v Milner*,¹⁰ the requirement to perform the contract within a particular date was followed by a stipulation requiring payment of interest. The subject matter in that case was railway stock. After setting out the stipulation requiring the purchaser to pay interest, Grove J (at p 348) said:
- C

- Now these latter words, which form the final clause of the third condition, make it quite clear that the parties to the sale contemplated the possible occurrence of a delay in completing the contract, and that they intended, in the event of that delay happening, to keep alive the bargain which had been entered into.
- D

- In the same passage, Grove J makes it clear that that case did not concern unreasonable delay. Since it is part of Mr Abraham's submission that there was delay in this case and that therefore the plaintiff should not obtain specific relief, I shall deal with this aspect of the case at the appropriate stage.
- E

For the reasons I have given, I reject Mr Abraham's submission that time is of the essence.

FRUSTRATION

- F Did the injunction in the Monsia suit frustrate the redemption agreement? If it did, then to what extent? These are the burning questions that have to be dealt with. Numerous authorities were cited by both counsel on the law of frustration of contracts. I am, however, content to rely on the following passage in the judgment of Abdul Hamid Omar FJ (as he then was) in *Ramli bin Zakaria v Government of Malaysia*¹¹ at p 262 where he said:
- G

- In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.
- H

- As I understand Mr Abraham's argument, its thrust appears to be that the whole of the redemption agreement was frustrated by the injunction in the Monsia suit. He emphasized in his submission that the delay in performing the contract has had the effect of depriving his client of substantially the whole benefit that it was intended his client should obtain from the redemption agreement. He cited passages in the speech of Lord Diplock in *United Scientific Holdings Ltd v Burnley Borough Council*¹² in support of this argument.
- I

What benefit has the defendant bank lost by the delay in performance occasioned by the injunction? The answer to this question would, in my opinion, deal with the point raised by counsel for the defendant bank. In my judgment, the defendant bank would suffer no detriment or loss of benefit or any prejudice if the redemption agreement is performed even today. It agreed to receive RM18m (being the balance) and interest on that sum for any period of delay. The interest is the benefit it receives if there is delay, however brief or long the delay may be. It is quite contrary to the intention of the parties to construe this contract, ie the redemption agreement, in any other fashion. It would in fact make nonsense of the express words to be found in the agreement. The duty of a judge is to construe an agreement in order to give effect to the true intention of the parties, objectively perceived. To do otherwise is to abandon the judicial function and to ride roughshod over settled and well-established principles of construction.

Further, the defendant bank is obliged to discharge the charges only after it has received RM18m and any and all interest due on that sum. Until then, the lands remain encumbered against the plaintiff. Whilst the defendant bank cannot foreclose on the charges, it holds those charges as security to ensure performance of the plaintiff's obligation to pay RM18m and all interest on that sum. Its right to those moneys are preserved; not lost. The plaintiff cannot get its titles back from the defendant until it has paid in accordance with the redemption agreement. These are clearly benefits that still exist in favour of the defendant.

In the circumstances, I reject the submission made by Mr Abraham on this point.

Let me suppose for one moment that I agree with Mr Abraham and hold that the redemption agreement has been frustrated and that the charges have revived thereby entitling the Bank to proceed to sell off the lands by public auction and recover more than RM18m and interest on that sum. The effect of this would be that a huge burden would be placed on the shoulders of the plaintiff by reason of an event unforeseen by the parties and not due to the fault of either of them. On the other hand, if there had been no frustration and the plaintiff had even wilfully defaulted in providing the bank guarantee as required by the redemption agreement, at worst, it would have had to pay the RM18m and interest thereon as provided by the redemption agreement but its lands would be safe from the risk of public auction. Were I therefore to accept Mr Abraham's submission, a greater harm would befall the plaintiff when he is innocent rather than when he is guilty of a breach of contract. Such a conclusion is revolting to my mind and I cannot accept it as the consequences are practically unjust.

For the reasons that I have given, I hold that the provisions or cl 5 of the redemption agreement are not frustrated. By reason of my finding, it is unnecessary for me to consider the other submissions made on whether the whole agreement is frustrated and the frustrating event was self-induced. Either factor is irrelevant if the fundamental bargain enshrined in cl 5 has survived and lives on despite the injunction in the Monsia suit.

A DISCRETIONARY CONSIDERATIONS

Counsel for the defendant has also argued that no specific relief should be granted for the following reasons:

- (1) delay;
- (2) unclean hands; and
- (3) acceptance of breach.

B

I will deal with each of these in turn.

Delay

- C There is no doubt that the plaintiff did not come to this court with the speed that is expected of it. However, I have examined the reasons given by the plaintiff in its affidavit and as explained by its counsel in his oral argument. Looking at all the circumstances of the case and taking into account that no prejudice whatsoever would result to the defendant, I do not think that justice would be served by penalizing the plaintiff for its delay in approaching the court. In exercising my discretion whether to grant specific relief, I have taken into account all that has been said against the plaintiff on this point but I am nevertheless convinced that I should exercise my discretion in the plaintiff's favour.
- D

E *Unclean hands*

Mr Abraham has attacked the motives of the plaintiff in bringing this action. He has suggested that there is a concerted effort by several persons, including Dato' Yap Yong Seong, Lim Fap Khoon to continuously litigate against the defendant. I have given my most anxious consideration to the points made by Mr Abraham both in his written and oral submissions. I have also taken into account the explanations given by the plaintiff in the affidavits filed on its behalf. I do not consider any of these points raised by Mr Abraham as constituting grounds for refusing relief to the plaintiff. At the end of the day, it is a question of construing documents and arriving at a conclusion of law. In dealing with this case, I have drawn support from the majority judgment of the Supreme Court in *Bank Negara Malaysia v Mohd Ismail*¹³ and applying the principles enunciated therein as to what constitutes a triable issue, I am entirely satisfied that there are no triable issues raised by the defendant in the present case.

F

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Further, as I have said earlier in this judgment, I have taken into account all factors operating against the plaintiff in the context of specific relief and I would exercise my discretion in favour of the plaintiff despite all that has been said against it.

H

Acceptance of breach

- I Mr Abraham has drawn my attention to three letters dated 26 February 1990, 1 March 1990 and 15 June 1990, respectively. In the first of these, after referring to the Monsia suit, the defendant's solicitors enquired of the plaintiff's solicitors what their stand was in respect of the redemption

agreement, ie whether it is valid or invalid. The plaintiff's then solicitors replied, stating that the defendant's election to proceed by way of foreclosure proceedings despite the redemption agreement constituted an act of repudiation which the plaintiff accepted subject to the institution of appropriate action. By the third letter, the defendant's solicitors disagreed that there had been a repudiation of the redemption agreement by their client and alleged that it was the plaintiff who had repudiated the redemption agreement.

The law on repudiation is set out crisply in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd*¹⁴ where the Supreme Court speaking through Mohamed Azmi SCJ stated as follows:

Even a deliberate breach will not necessarily entitle the innocent party to treat himself as discharged, since it may sometime be that such a breach can appropriately be sanctioned by damages (see *Suisse Atlantique Societe v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 367 at p 435). It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do that will justify the other in repudiating the contract, but there must be an absolute refusal to perform his part of the contract (see *Freeth v Burr* (1874) LR 9 CP 208 at p 214). If there is an absolute refusal to perform, the other party may treat himself as discharged. Short of an express refusal, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. Where such an inference cannot be drawn, the innocent party will be entitled to claim damages for breach, but not to treat himself as discharged.

Mr Abraham also cited *Johnson v Agnew*¹⁵ and *Fercometal SARL v MSC Mediterranean Shipping Co*¹⁶ for the proposition that once a party to a contract has accepted the breach by the other, his only remedy is to sue for damages and not for specific relief. I accept the proposition advanced by Mr Abraham. But it is my duty to construe the three letters together and as a whole and test them against the background of the case and against all the circumstances of the case to see what the intention of the parties in writing these letters was. It must be remembered that these letters were written at a stage when the Monsia suit was ongoing. Although at first blush, it would appear as if the plaintiff's solicitors had accepted the alleged repudiation by the defendant, one has also to consider the defendant's stand. This is a case of the pot calling the kettle black. Each party was blaming the other. Also, the defendant appears to have taken the stand at that stage that the agreement was subsisting despite the injunction and that it was therefore capable of repudiation. The question then arises as to how a frustrated agreement can be repudiated. The authorities on this point, which are all to be found in such treatises as Cheshire & Fifoot on the *Law of Contract* and *Chitty on Contract*, are unanimously of the view that once a frustrating event occurs, there is no room for the doctrine of repudiation. Taking into account all the circumstances of the case, I hold that there was no true repudiation in this case by the defendant which I believe acted on the assumption that the redemption agreement had been frustrated and was therefore entitled to prosecute the foreclosure proceedings and I also hold there was therefore, no true acceptance of a repudiation as the law

A understands it by the plaintiff whose intention, it would appear at all times, was to redeem the lands. This intention was also declared in its solicitors' letter dated 8 August 1991 which was written after the Supreme Court stayed the Monsia suit.

B In any event, the defendant has taken the position that it has never repudiated the agreement and I do not think it should now be heard to say that the plaintiff accepted a repudiation that never was.

C While on this point, I would like to digress and deal with one other aspect of the case. Mr Abraham faulted the plaintiff for not applying to dissolve the injunction obtained by Monsia. I believe the answer to that is to be found in para 5 of the affidavit of Lim Ah Bah (encl (15)) dated 12 November 1993 in which it is stated that the effect of the stay granted by the Supreme Court was that the injunction had ceased to have effect. The plaintiff appears to have taken the same approach which accounts for the failure of both parties to move for the dissolution of the injunction. I am inclined to accept the contention of Mr Lim Ah Bah (given on solicitors advice) that the order of stay granted by the Supreme Court had the automatic effect of putting an end to the injunction as well. In my judgment, no separate application to dissolve the injunction was necessary.

CONCLUSION

E For the reasons I have given in this judgment, I would dismiss the defendant's summons in encl (4) and grant prayers 1, 2 and 5 of the plaintiff's summons in encl (10). The prayer for damages in encl (10) is hereby dismissed. In respect of the order for specific performance, I grant general liberty for parties to apply as to the form in which the order should be settled. I would also award the plaintiff costs of the proceedings before me in respect of both applications.

F *Order accordingly.*

Reported by Jeanne Tan

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